IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRASATLANTICA, also known as SPANISH LINE and GARCIA & DIAZ, INC. and QUIN LUMBER CO., INC.,

Respondents.

PETITIONER'S REPLY BRIEF

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This brief is in reply to seven opposing briefs (four by the four respondents and three by four *amici curiae*).

One of the *amici* briefs is jointly by a Norwegian *Federation* and a Swedish *Association* of *shipowners* which compete with and are opposed to the competitive interests of the American merchant marine and to our public policy. The other two *amici* briefs by the British Government and Danish Government similarly represent the competitive interests of the great British and Danish *shipowners*.

The seven opposing briefs contain no arguments in the interest of Norwegian, Swedish, British, Danish or Spanish *seamen*, or in the interest of American shipping, American seamen, American institutions, or American policy.

Because the briefs of Compania and the four *amici* represent only the competitive and baronial interests of the foreign shipowners, International Seamen's Federation of 634 Eighth Avenue, New York 18, N. Y. and International

Merchant Seamen's Service, Inc., of 19 Broad Street, New York 4, N. Y., requested permission to file *amici* briefs representing the opposed interests and views of foreign seamen.

And St. Mary's Hospital of Hoboken, N. J. requested permission to file an *amicus* brief representing the interests of American hospitals along our seacoast.

But the Clerk of this Court by letter of February 11, 1958 advised petitioner's counsel that the time for filing *amicus curiae* briefs "in support of the petitioner's position has long since expired."

I

The briefs of Compania and Garcia expressly and the others by their arguments and conclusions misrepresent the motions and the "pre-trial hearing" had below.

Compania's brief quotes the first, third and fourth defenses and states (p. 7) that prior to the suit being assigned for trial it moved "on the basis of these defenses, to dismiss the suit as against it," and again (p. 27) that application was made for a hearing "on these defenses" of lack of jurisdiction and "failure to state a claim upon which relief can be granted." Garcia's brief (pp. 6-7) even contends that "summary judgment" was granted because there was "no showing" of "neglect on its part contributing to petitioner's injury."

But as the Court stated and Mr. Quinlan, counsel for both Compania and Garcia confirmed, at the conclusion of the hearing, "So there will be no misunderstanding", the only motion by each defendant was "for a dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter" (R. 194a). See R. 2a, l. 13; R. 97a, ll.

9-15; R. 117a, l. 24. Compare the statement in Quin's brief (p. 2) that

> "the defendants moved to dismiss the action in view of the court's lack of jurisdiction of the subject matter of this action".

In *The Mayor* v. *Cooper*, 1867, 6 Wall. (73 U. S.) 247, of such a motion (p. 249), this Court said, at page 254:

> "The validity of the defence authorized to be made is a distinct subject. . . . *It has no connection whatsoever with the question of jurisdiction.*"

Nevertheless, all of the opposing briefs seek affirmance of the judgment which determined that petitioner had no enforceable "right"—a determination made, as the Quin brief states (p. 5) "Without allowing any proof as to the manner in which the accident occurred".

Compania's brief (pp. 9, 25) represents petitioner as contending that a full trial is a "prerequisite to consideration of the jurisdictional motion". But, quite the contrary, petitioner's brief actually contends (pp. 17, 20) that the motions to dismiss for lack of jurisdiction of the subject matter *should have been summarily denied;* that the Court's failure to distinguish between jurisdiction and merits deprived petitioner of his right to a trial of the merits in the manner prescribed by law (p. 33, *et seq.*); that only the issue of diversity could admit of evidence and findings on jurisdictional pre-trial hearing (p. 36); that the evidence taken on other issues related to the merits and should be stricken out and the findings set aside (pp. 33, 36, 58); and (p. 40 *et seq.*) that the Jones Act clearly requires that the case be fully tried before a jury and precludes dismissal for lack of jurisdiction of the subject matter or on foreign law defenses and without trial of plaintiff's Jones Act and American maritime law claims.

II

The misstatement of and misplaced reliance on the theory of a foreign law of the flag.

In a brief which does not even cite *Wildenhus' Case*, 1887, 120 U. S. 1, *Uravic* v. *Jarka*, 1931, 282 U. S. 234, or *The Schooner Exchange* v. *McFaddon*, 1812, 7 Cranch (11 U. S.) 116, the Norwegian Shipping Federation and Swedish Shipowners Association claim (at p. 5) that petitioner seeks to overrule *U. S.* v. *Flores*, 1933, 289 U. S. 137, and (at p. 27) that petitioner seeks to reverse cases applying the Jones Act to injuries sustained by American seamen on American vessels while in foreign ports.

The briefs of Compania (pp. 14, 19) the Danish Government (p. 6) and the British Government (pp. 4, 6-8) also treat the theories of "law of the flag" and "law of the port" as though our law could embody only the one or the other for all purposes; and as though by applying in our courts our law to adjust claims affecting only Americans on an American vessel in foreign waters, the United States has in some unexplained way ceded its sovereignty over its ports and territorial waters.

The British Government brief (p. 6) even contends that this Court is bound to apply as respects British vessels in American ports a "law of the flag" theory such as the British courts themselves do not apply either to British vessels in foreign waters or to foreign vessels in British waters.*

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* In *Carr* v. *Francis Times & Co.* (1902), A. C. 176 (H. L.), there cited Lord Macnaghten said:

> "It was committed within the territorial waters of Muscat, which are, in my opinion, for this purpose as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway."

(*Footnote continued on following page*)

In *Chung Chi Cheung* v. *Rex* (1939), A. C. 160 (1938); 62 Ll. S. Rep. 151, after citing at page 168 and quoting with earnest approval from *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 *supra*, the British Court said, at page 174:

> "Their Lordships have no hesitation in rejecting the doctrine of extra-territoriality expressed in the words of Mr. Oppenheim, which regards the public ship 'as a floating portion of the "flag state".' However the doctrine of extra territoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts."

The arguments that the foreign "law of the flag" must be applied in this case is an effort to extend a fiction to a point which would be "dangerous". This would represent a judicial renunciation of American sovereignty, jurisdic-

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(*Footnote continued from preceding page*)

In *MacKinnon* v. *Iberia Shipping Co.* (1954), 2 Lloyd's Rep. 372, also cited in the British Government brief (p. 6) Lord Carmont, citing numerous authorities, said, at page 375:

> "These cases point conclusively to the *locus delicti* being the country having the territorial waters within which the ship was at the relevant time, and that it matters not a whit whether the vessel was navigating or at anchor, in a roadstead or tied up to a quay, and also, what is equally clear, whether the events founded on as the basis of the delict or quasi-delict are wholly internal to the vessel, or partly external to it as in the case of a collision between vessels in territorial waters".

At page 376, speaking of the Merchant Shipping Act, he said:

> "Even where there is express application to British ships, as, for example, in Sects. 260 to 262, the sections may cover foreign vessels because the language used contains 'affirmative words merely and not negative words which can alone restrict some general application appearing elsewhere in the Act.'"

Lord Sorn said, at page 378:

> "As regards the first point, I think that, for the purposes of the rule, no distinction is to be drawn between territory and territorial waters."

tion and policy within a portion of the United States where sovereignty and jurisdiction have always prevailed. Instead of a foreign ship making an "entry" into American territory on any arrival here, our inspection would become an invasion by our authorities of foreign territory whenever we entered upon or levied process against foreign ships. If a tort, as serious in consequences as this one, is without the "jurisdiction" of our Courts to investigate and adjudge as to liabilities under our law, it is difficult to conceive of any matter to which our law can apply as respects a foreign vessel in our ports.

The kinship between crime and negligence has been recognized. In *Jamison* v. *Encarnacion*, 1930, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 1930, 281 U. S. 642, this Court held that assault is Jones Act negligence. *Uravic* v. *Jarka*, 1931, 282 U. S. 234, held Jones Act Sec. 33 applicable where a longshoreman sustained injury due to negligence on a German vessel in the harbor of New York; and this Court cited *Wildenhus' Case*, 1887, 120 U. S. 1, where one Belgian crewman killed another Belgian crewman below decks on a Belgian vessel in the Port of Hoboken, and had then been indicted under a New Jersey state statute covering murder committed by "any person" in the state.*

Yet *New York Central R. R. Co.* v. *Chisholm*, 1925, 268 U. S. 29 and *Slater* v. *Mexican National R. R.*, 194 U. S. 120, clearly show that if either *Wildenhus* or *Uravic* had been across the border our law would have no application.

The argument of our opponents would treat the persons (Spaniards and Americans alike) involved in the Romero *tort* as though they were outside the United

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*Of course, the New Jersey legislature had not foreseen one Belgian killing another on a Belgian vessel nor did the State Statute contain any statement that the Act should apply to foreign ships or foreign seamen. But this Court, on *habeas corpus*, found no difficulty in sustaining the New Jersey jurisdiction.

States and within Spanish sovereign territory while on board the *S. S. Guadalupe*, tied up at a Hoboken pier. For their argument is that either *U. S.* v. *Flores, supra*, 1933, 289 U. S. 137, must be overruled, or the foreign law of the flag must be enforced in our Courts.

However, both *U. S.* v. *Flores, supra*, 1933, 289 U. S. 137 at 157-158 and *U. S.* v. *Rodgers*, 1893, 150 U. S. 249, 260, on which it principally relies, expressly recognized that the law of the port can properly be applied by the Courts of that nation to matters occurring within its territorial waters, and that "This doctrine does *not* impinge on that laid down in *United States* v. *Rodgers, supra*" (289 U. S. 159), and applied in *U. S.* v. *Flores, supra*.

Neither set of decisions impinge in any way on the exclusive and absolute jurisdiction of the United States within its own territory, and the full and complete power of the nation over foreign merchant shipping in our territorial waters, expounded by Chief Justice Marshall in *The Schooner Exchange* v. *McFadden, supra*, 1812, 7 Cranch (11 U. S.) 116, 136, 143, 144-146, and applied in *Wildenhus' Case, supra*, 1887, 120 U. S. 1, 4-5; *Strathearn S. S. Co.* v. *Dillon*, 1920, 252 U. S. 348 and *Uravic* v. *Jarka Co.*, 1931, 282 U. S. 234, 239-240.

The Jones Act (Act of June 5, 1920, c. 250, 41 Stat. 988) *in both Sec. 31 and Sec. 33* (41 Stat. 1006, 1007) employs the principles of law of the flag as to American vessels and law of the port as to foreign vessels in American waters.

The statute, R. S. Sec. 4530, involved in *Strathearn S. S. Co.* v. *Dillon, supra*, 1920, 252 U. S. 348 (decided 37 days before Report No. 573 of the Senate Committee on Commerce proposed *both Secs. 31 and 33*) employed in this manner both the law of the flag principle and the law of the port principle, both before and after its amendment by Sec. 31. It employed the law of the flag principle as

to American vessels by the provision as to

> "Every seaman *on a vessel of the United States* . . . at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended."

And it equally employed the law of the port principle as to foreign vessels by the proviso that the section

> "shall apply to *seamen* on foreign vessels while in harbors of the United States, and the Courts of the United States shall be open to such seamen for its enforcement."

Section 33 of the Jones Act equally employs both principles in the comprehensive permissive provision that

> "*Any* seaman who shall suffer personal injury in the course of his employment *may, at his election, maintain an action* for damages at law, with the right of trial by jury."

Panama Railroad Co. v. *Johnson*, 1924, 264 U. S. 375, applied it as law of the flag where the injury occurred on an American vessel in foreign (Ecuadorian) waters. *Uravic* v. *Jarka Co.*, 1931, 282 U. S. 234, applied it as law of the port where the injury occurred on a foreign (German) vessel in an American port.

In *Panama Railroad Co.* v. *Johnson, supra*, this Court said:

> "*The statute extends territorially as far as Congress can make it go*, and there is nothing in it to cause its operation to be otherwise than uniform" (264 U. S. 392). (Italics ours.)

In *Uravic* v. *Jarka Co., supra*, where the ship was foreign but the *locus* here, this Court said:

> "It always is the law of the United States that governs within the jurisdiction of the United States, even when

for some special occasion this country adopts a foreign law as its own. *The Exchange,* 7 Cranch 115, 136. *The Lottawanna,* 21 Wall. 558, 571, 572. *The Western Maid,* 257 U. S. 419, 432. *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 124. There hardly seems to be a reason why it should adopt a different rule for people subject to its authority because they are upon a private vessel registered abroad. They are not within the exception as to public armed vessels of a foreign sovereign, whatever its extent. *The Exchange,* 7 Cranch 115, 143. Crimes committed upon such private vessels may be punished by the territorial jurisdiction. *Wildenhus's Case,* 120 U. S. 1. *Patterson* v. *Bark Eudora,* 190 U. S. 169, 177. We see no reason for *limiting* the liability for torts committed there, when they go beyond the scope of discipline and private matters that do not interest the territorial power." (Italics ours.)

Where, therefore, Congress clearly has employed both theories in enacting, and this Court has employed both theories in construing Sec. 33 of the Jones Act, the argument that the one theory precludes the other is wholly without foundation.

III

This is not a case of internal economy and discipline of the vessel and of undisturbed peace, dignity, tranquility and economy of the port.

The briefs of Compania (pp. 14, 19), the British Government (pp. 6-8) and the Danish Government (pp. 4, 6) all claim that the tort involved only internal economy and discipline of a Spanish vessel and did not involve the peace or dignity of the country, the tranquility of the port, public policy, or economic interests of any Americans. This theory ignores both the facts and our Congressonally declared public policy.

The crime involved in *Wildenhus Case*, 1887, 120 U. S. 1, did not, and no accident even to an American could more completely affect in its consequences the peace and dignity of the country, its public policy, the tranquility of the port, and domestic economy and economic interests of Americans than this accident. Eighteen features, each of which would be disturbing, combine as continuing disturbance.

1. Domestic peace, dignity and tranquility and economic interests of Americans were affected and disturbed as soon as Garcia & Diaz ordered that on this occasion the Spanish crew do the work of topping the booms which ordinarily and theretofore was properly done by specialized American longshore riggers. The American riggers were suddenly deprived of profitable work and income, and this while longshoremen and carpenters, fellow union members with the riggers and already on board ship, stood around angry and resentful. The potentialities were present of a labor brawl involving aliens and Americans in an American part; and of a possible strike tying up the port as to incoming cargo, with economic ramifications not only in the ports but which would affect the whole United States.

2. Whether vindictively or to get ready to descend through the hatch, some of the Americans kicked aside the metal lines which had been laid out carefully by Romero on the hatch cover.

3. Some of the alien seamen assigned to the rigging job, including the bosun in charge, were called away by Americans and left without giving instructions to the winchman not to operate the winch.

4. One leg of the man was completely severed by the line, his other leg broken and other injuries suffered in the presence and by reason of negligence of the alien crew members and Americans alike.

5. As soon as the accident occurred both Port Authority and Hoboken police were immediately called and rushed to the scene, and an American hospital, St. Mary's Hospital of Hoboken, New Jersey, was called for an emergency ambulance.

The emergency was a domestic emergency to which under American law the American police, Port Authority police and the American staff of St. Mary's Hospital were obliged to respond.

The hospital obligation was under American law, as was that also of those who telephoned the hospital and sought, while awaiting the ambulance, to save the seaman's life.

6. An American ambulance driver, stretcher bearers, doctor and nurse were instantly alerted in response to the emergency.

Their "peace" and "tranquility" were disrupted, and at break-neck emergency speed, with screaming sirens, they rushed in the ambulance to the pier where the ship was docked and the injured man was at point of death.

7. En route every interfering traffic right of other vehicles and individuals was suspended. The ambulance siren and traffic police officials en route enforced instantly and completely the right of way of the ambulance—all by reason of effective American law and custom respecting emergency and ambulance right of way. The peace and tranquility of every citizen along the right of way was disturbed.

8. On arrival the doctor, nurse, and stretcher bearers went on board the vessel and took immediate and effective control of the injured man—by virtue of their authority and function under American law.

9. They rushed back to the hospital with the injured man, again with sirens, police and police regulations

giving an enforced right of way to the ambulance regardless of every citizen's convenience en route.

10. The hospital staff had been alerted and worked under emergency preparing for the injured man's treatment. Surgeons and nurses were ready and immediately commenced administering to the man—work which was to continue for eight months.

11. Repeated blood transfusions were administered of American blood. Surgical operations were performed. Oxygen and drugs were administered. Last rites were administered by an American priest. For a considerable time at the hospital a twenty-four hour watch over the man was necessary.

12. Detailed police and Port Authority reports were made, certainly as necessary and important, if not more important than any ship's log entry.

13. The Hoboken police took the man's severed leg from the ship and kept it under police refrigeration for several days until it was made known that the man desired it to be buried in holy ground, and this was done in an American cemetery.

14. Immigration officials were obliged to reclassify the man, who otherwise must have shipped out within 29 days; and Immigration officials have been obliged to conduct hearings, grant extensions and keep track of the man ever since.

15. The hospital, its staff and the doctor, like the police, were in no position to bargain and haggle—they were functioning under American health and police law regulations; their duties, liabilities and rights were prescribed by American law. Had there been police misfeasance, or hospital, surgical or physician malpractice, their liabilities would have been under American law. Had any hospital equipment proved defective or drugs wrongly labeled or stale, or

had blood been wrongly classified for transfusion (cf. *Joseph* v. *W. H. Groves Latter Day Saints Hospital*, 1957, 318 P. 2d 330), the liability of manufacturers, druggists, blood bank and hospital would have been under American law. Their rights to be compensated for their services and the use of their facilities and provisions are under American law.

16. For eight months St. Mary's Hospital administered to the man; it treated him, maintained him, including artificial feeding during helplessness, and food, medicines and care for eight months.

17. The hospital bill alone amounts to $3,750.60, no part of which has been paid.

18. Any competing American shipowner on whose vessel a similar tort occurred would be unquestionably liable in damages; and the economic welfare of the American merchant marine and the policy of our Government to do everything necessary to develop and encourage the American merchant marine would be undermined by holding that the competing foreign shipowners are not subject to similar liability in our ports and our Courts.

This accident disturbed the domestic peace and tranquility of the port, and economy of Americans.

The argument in Compania's brief (p. 5) that under Spanish law it "could not commit its insurer to charges here" "for if it did it could not be reimbursed for those charges by its compensation insurer" shows both the inadequacy of the Spanish law remedies proposed, and a callous attitude and intent by Compania which is intolerable to the law and institutions of America.

Compania's asserted theory is that both the hospital and the man can be paid only what its Spanish insurer dictates—*with the rest of the expense incurred here to be*

borne by the American purse. Its failure to pay anything whatever to the hospital to date is indicative of an intent to pay nothing of the American bills unless compelled by an American court.

The submission by the British and Danish Governments, the Norwegian Shipping Federation and the Swedish Shipowners' Association of briefs seeking affirmance of dismissal of the complaint upon representations and arguments supporting the position of respondent Compania magnifies the importance of what is at stake. It demonstrates that the governments and shipowners' associations of these four great foreign maritime countries wish the dismissal to stand as an American law precedent for the benefit of their own shipping interests.*

If this Court accepts the arguments of Compania and of the British and Danish Governments and the Norwegian Shipping Federation and Swedish Shipowners' Association, the precedent will be a license from the American judiciary to all foreign shipowners to follow a similar course; to compete ruthlessly with the American merchant marine without incurring any liability for injuries occurring in our ports, and to saddle on American hospitals, surgeons and physicians, police, municipalities, charities, taxpayers and public the burden of treating and caring for foreign seamen injured in our ports along our extended coastline—without recourse—all on the incongruous theory that only internal economy and discipline of a foreign vessel are affected by the tort and is none of our business, and neither subject to our laws nor within the jurisdiction of our courts. It also will place American shipping at a great disadvantage and defeat the opposite public policy declared by Congress.

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* The brief of Norwegian Shipping Federation and Swedish Shipowners' Association (p. 4) deplores that "Unfortunately" the hospital bill has not been paid.

IV

The opposing briefs seek to have this Court defeat the Congressionally declared public policy by judicially re-establishing the "halting, hesitating, doubting policy" renounced by Congress.

When the Seamen's Act of 1915 was before Congress, Congressman Hardy had stated (52 Cong. Rec. 4646) that:

> "If you do not have rules that restrict *competitors* of the American merchant marine *to the full extent and just as you restrict the American merchant marine,* you never can have an American merchant marine." (Italics ours.*)

House Report No. 645 (62nd Cong. 2d Sess.) stated (p. 7):

> "Two things are essential to the building up of our merchant marine; one is the creating of a condition where the initial cost of the vessel is as low as that of the foreign vessel and *the other is an equalization of the operating expenses.*" (Italics ours.)

When five years later the Jones Act bill, amending and practically rewriting H. R. 10378, was reported out by Report No. 573 of the Senate Committee on Commerce, it was in a spirit of vigorous Americanism, "with a determination to secure our just portion of the world's carrying trade". The committee stated that

> "*Our shipowners and ship operators must be placed as nearly as possible on an equality in operating costs and operating conditions with their competitors.*" (Italics ours.)

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* The Furuseth Calendar," pages 25-29 of *A Symposium on Andrew Furuseth,* shows the progress of seamen's rights from 1854-1941. See also Furuseth's "Freedom Under the American Flag" and "Call to the Sea," *Id.* pages 19, 24.

The Jones Act was entitled as "An Act To provide for the *promotion and maintenance of the American merchant marine* . . . and for other purposes." In *Panama R. R. Co.* v. *Johnson*, 1924, 264 U. S. 375, 389, this Court accordingly said that Sec. 33 was enacted

> "as part of an act the *express object* of which was to provide for the promotion and maintenance of the American merchant marine."

Section 1 of the Jones Act (now 46 U. S. C. A., Section 861) as proposed and enacted provides that:

> "*it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.*" (Italics ours.)

Section 1 of the Merchant Marine Act of May 22, 1928, c. 675, 45 Stat. 689, now 46 U. S. C. A., Sec. 891, declares that:

> "The policy and the primary purpose declared in Section 861 of this title are hereby confirmed."

The Act of June 29, 1936, c. 858, Secs. 204, 904, 49 Stat. 1987, 2016, retained the declaration of policy in the Jones Act, 46 U. S. C. A. Sec. 861, and made a similar declaration of policy in Section 101, 49 Stat. 1985 now 46 U. S. C. A. Sec. 1101.

It is in this sense that the *Committee on Commerce* stated in the abstract quoted in the brief of the Norwegian Shipping Federation and Swedish Shipowners' Association (p. 21) that "No *interests*, but American *interests* have been kept in view", and that "if *our business* is to be cared for, we must do it."

This means that just as the interests of American *seamen* were kept in view in burdening *American shipping* with liability for their injuries; equally *the interests of American shipping* were kept in view by burdening *competing foreign shipping* with equal liability for injuries to foreign seamen within our ports.

As had been pointed out on page 6 of the Government's brief submitted in *Strathearn S. S. Co.* v. *Dillon*, 1920, 252 U. S. 348 (No. 373, October Term, 1919), an 1884 effort by Act of June 26, 1884, c. 121, 23 Stat. 53, to *equalize costs* by the *opposite method* of reducing American standards to the foreign level "had failed of the desired results." That act had been entitled "An Act to *remove* certain burdens of the American Merchant Marine and *encourage* the American foreign carrying trade, and for other purposes."

The same word "*encourage*" used in that title was used in the term "develop and *encourage*" in the declaration of policy in Section 1 of the Jones Act. This fundamental object was the same, the method only being opposite.

When proposing in Report No. 573 to follow in the Jones Act the opposite course successfully followed in the Seamen's Act of 1915 of raising the "operating costs and operating conditions" of foreign shipping to equalize "as nearly as *possible*" the American operating costs and operating conditions, the Committee warned that if this were not done "it will be but a short time until our fleet will be dissipated and our flag driven from the sea, and we will again be in the same dependent and humiliating position we were before the war".

The policy declared by Congress "to be the *policy of the United States*" is, of course, the policy of the whole United States. It is the policy for every state and every branch of the Government of the United States, including the judicial branch. It is the policy for both State and

Federal Courts including this Court and the United States District Courts and Courts of Appeals.

Every part of the Jones Act, including Section 33, therefore, is to be construed and given effect by Courts, themselves bound "to do whatever may be necessary to develop and encourage the maintenance" of the *American* merchant marine, and to place American shipowners "as nearly as possible on an equality in operating costs and operating conditions with their competitors."

The Committee stated that *"No halting, hesitating, doubting policy will succeed"*. See Comm. Rep. 573—Pet. Brief 47.

But it is precisely such a *"halting, hesitating, doubting policy"* which the opposing briefs urge; and which Judge Sugarman assumed to exist in making his anguished reference to what he assumed to be "all of these complex, confounding and complicated situations involving jurisdiction under the Jones Act . . . where the injury takes place *in our territorial waters"* (R. 99a).

The lower courts, however, must not be permitted thus to reestablish and apply such a "halting, hesitating, doubting policy" to judicially *construe* Section 33 as excluding foreign shipowners from liability for injuries sustained in our ports and treated in our hospitals, and thereby judicially *defeat* the Congressional policy. "A construction which would lead to such a result cannot be sound" (cf. *Martin* v. *Hunter's Lessee*, 1816, 1 Wheat. (14 U. S.) 304, 329.

The opposing briefs do not, as they could not, contend that the Jones Act contains anything to show that Congress "intentionally excluded" a tort such as this "from a description that on its face includes" it (*Uravic* v. *Jarka*, 1931, 282 U. S. 234, 239), or intended to exempt competitive foreign shipping from this burden which American shipping must bear.

Their common effort instead is to persuade this Court that *the Court by construction* should judicially exclude them, where Congress has not, and this in order to afford them precisely the competitive advantage of the lower operating costs and compensation provisions under which foreign shipping competes with our own shipping, and which Congress intended to prevent.

The Congressional purpose was to *equalize* operating costs "as nearly as *possible.*" The opposing briefs would have the Court instead enforce in favor of competing foreign shipowners an *inequality* wherever "possible".

This Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 59, and *Kernan* v. *American Dredging Co.*, 2 L. Ed. 2d 382, decided at this term and not yet officially reported, significantly contrasted "public policy" antedating FELA and (speaking of "the effective defenses of assumption of risk and contributory negligence" which FELA removed), said in *Kernan*:

> "This limited liability derived from a *public policy*, designed to give maximum freedom to infant industrial enterprises, 'to *insulate* the employer *as much as possible* from bearing the "human overhead" which is *an inevitable part of the cost*—to some one—of the doing of industrialized business'. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 59."

When we compare the dual purposes of Congress, in enacting the Jones Act, (1) to establish the reverse policy of having the shipowner bear this "inevitable part of the cost," and (2) to place our shipowners and operators "*as nearly as possible* on an equality in operating costs and operating conditions with *their competitors*", they are completely incompatible with any intention that the Jones Act, nevertheless, should by *construction* be made to "in-

sulate" competing foreign owners of ships in our ports from bearing like costs of torts occasioned here.

This Court also has recognized as proper reason for policy a purpose "to *discourage negligence* by making wrongdoers pay damages" (*Bisso* v. *Inland Waterways Corp.*, 1954, 349 U. S. 70, 91), saying that "The dangers of modern machines make it more necessary that negligence be *discouraged* (349 U. S. 91). "The Act . . . is intended to stimulate carriers to *greater diligence* for the safety of their employees" (*Jamison* v. *Encarnacion*, 1930, 281 U. S. 635, 640).

The construction that owners of foreign flag vessels seek here, an insulation against liability for negligent acts performed here, will encourage negligence and increase the number of helpless seamen who our taxpayers must support.

Progressively there is developing the very "dissipation" of our own merchant marine that Senator Jones warned against—this, by reason of the judiciary's failure to enforce as fully as possible the public policy of the Jones Act.

Since Sec. 33 of the Jones Act incorporated all of FELA (*Kernan* v. *American Dredging Co.*, *supra*), it clearly incorporated Sec. 5 (now 45 U. S. C. Sec. 55). This is recognized in *Jamison* v. *Encarnacion*, 1930, 281 U. S. 635, at 639. Hence, with the Jones Act properly applied to all these torts occurring here, no "contract, rule, regulation or device whatsoever" can be relied on to defeat either jurisdiction or an equalizing liability.

The very point made in the British Government brief (p. 5) that "one foreign seaman injured in an American port would have . . . a quantum of recovery much in excess of other seamen serving on the same vessel under the same articles who had been injured on the vessel at other than an American port"* shows that such Sec. 33

liability is within the expressed object of the statute and will promote—whereas an opposite construction will defeat—the basic policy, purpose and intent of Congress.

The argument seeks to have the judiciary enforce a limitation of costs the foreign owner can be held for here, to such as he would incur abroad if he never competed here, instead of the equalization of costs here which Congress intended must be made.

The cost to the competing foreign shipowners of judgment rendered here will *not* exceed the cost our American shipowners are burdened with; and "*equalization*" of that cost as nearly as possible is the declared purpose of the statute. Any influence of this on foreign seamen *not* injured here could but aid in promoting that purpose by ultimately causing foreign owners to raise their standards to equalize our own.

In making the argument, counsel for the British Government evidences no interest whatever in the welfare of the "other seamen" mentioned; but simply a competitive undisguised interest in defeating, and, an undisguised effort to defeat the policy of equalization declared by Congress, so as to enable competing foreign *owners* to continue to compete without incurring costs equal to those borne by the American merchant marine.

The argument in the briefs of the Danish Government (pp. 3-4) and the British Government (p. 4) concerning their and Spain's economic factors allegedly differing from American and that "What might seem a minor extra burden to the United States could be a major disaster to Danish shipping and hence to Denmark's entire economy" (Danish Government brief, p. 4)—begs the question. We have nothing, moreover, but counsel's statement in

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* Is this not inevitable in view of the greater costs to hospitals and maintenance agencies of treating and caring for the people injured here?

the brief that such would be the case. If it be a fact, Congress must have had the fact in mind in establishing the public policy of equalization of costs. It is an argument wrongly addressed to the Court instead of to Congress or the treaty making power. It is, moreover, a strictly baronial argument; and its very advancement proves the point emphasized so earnestly by Senator Jones of the necessity of requiring competing foreign shipowners respecting matters occurring in American ports to bear resulting costs equally with American shipping.

Peculiar, indeed, is the argument in the brief of the Norwegian Shipping Federation and Swedish Shipowners Association (pp. 22-24) that to allow petitioner to recover under the Jones Act would indirectly "subsidize" the American Merchant Marine by resort to "subterfuge". If judicial "subsidy" or "subterfuge" be called for by either proposed construction of the Jones Act, it is our opponents who seek it for the *competitors* of the American Merchant Marine—directly contrary to the policy declared in the Jones Act and to Representative Green's remarks quoted on page 50 of petitioner's main brief.

V

The misrepresentation of petitioners contention that, in light of *Strathearn S. S. Co.* v. *Dillon*, the first clause of Section 33 makes clear that the section applies to foreign seamen injured here.

The briefs of Quin (p. 8) and of the Norwegian Shipping Federation and Swedish Shipowners Association (p. 26) represent petitioner as contending that as respects American seamen there was no need to enact the *Jones Act* and that the *Jones Act* was superfluous as to American seamen.

This is a calculated misrepresentation of petitioner's contention—a tactic that would not have been used if they had been able to devise any effective refutation of petitioner's actual contention.

Petitioner in both his petition and his brief has contended that, while as to *American* seamen it *was necessary* to enact a provision (in substances such as the *second clause* of Section 33) *to make the Federal Employers' Liability Act applicable* to seamen, *this was all that was necessary as to American seamen;* that, by contrast, the *first clause* of Jones Act Section 33—providing that "any" seaman "*may, at his election, maintain an action* for damages at law with the right of trial by jury"—was *unnecessary* and superfluous as to American seamen, since *they* would have such election and right to a jury trial under the Constitution and Judicial Code if and as soon as the Employers' Liability Act was made applicable; and that, as held of a comparable provision, superfluous to American seamen, in *Strathearn Steamship Co.* v. *Dillon* (1920), 252 U. S. 348, 354, the enactment of the "*first clause*" of Section 33, superfluous to American seamen, was for the purpose of permitting suit under Section 33 by foreign seamen when injured on foreign vessels in ports of the United States.

For *American* seamen, it would have been sufficient to enact a statute to provide:

> That all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply in cases of personal injury suffered by seamen in course of their employment.

If the statute had been enacted in that form with nothing more, an action at law with a right of trial by jury could then be maintained under such statute by an American seaman by virtue of the Judicial Code provision, 28 U. S. C. A. Sec. 1331, without any necessity whatever for enacting the first clause of Sec. 33 to so provide.

In other words, once a substantive liability or right to damages were provided for by a Federal statute, the Judicial Code and Seventh Constitutional amendment would then effectively insure to any *American* seaman the right to maintain an action at law thereon with the right of trial by jury.

Moreover, the Federal Employers' Liability Act itself provides for concurrent jurisdiction of the State and Federal law courts (45 U. S. C. Sec. 56). Hence, all that was needed in the case of American seamen was the substantive provision to make the Federal Employers' Liability Act applicable to seamen.

A statute so worded without more, also might properly be applied by our courts to the case of a foreign seaman injured on a foreign vessel in an American port, especially when treated for months in an American hospital which remains unpaid. "The *existence of jurisdiction* in all such cases is *beyond dispute*" (*The Belganland*, 1885, 114 U. S. 355, 365); but its exercise might then have been discretionary, or controlled by a previously existing treaty (Id. 114 U. S. 364-365; see also *Strathearn S. S. Co.* v. *Dillon—An Unpublished Opinion by Mr. Justice Brandeis*, 69 Har-

vard L. Rev. 1179, 1189, quoted in Petitioner's main Brief, p. 45). As stated by Mr. Justice Brandeis:

> "Consequently *foreign* seamen needed a *grant of the right to sue*" (69 Harvard Law Rev. 1189).

It, therefore, was necessary in the case of only *foreign* seamen, but "superfluous" in the case of American seamen, to embody in the statute the *first clause* reading:

> "That *any* seaman who shall suffer personal injury in the course of his employment *may, at his election, maintain an action for damages at law, with the right of trial by jury.*"

Any purpose to force American seamen to elect whether to rest his action on negligence or on unseaworthiness is incompatible with the liberal principles of both the Jones Act and the maritime law and "seems impossible to reconcile" with *Baltimore S. S. Co.* v. *Phillips*, 1927, 274 U. S. 316. (See *Remedies for Personal Injuries to Seamen, Railroadmen and Longshoremen*, 71 Harv. L. Rev. 438, 454.)

Congress Gave Individual Seamen Choice of Forum.

As to foreign seamen only, it was necessary in this manner to substitute for the Court's discretion an unqualified permission for any seaman "at *his* election" to "*maintain an action*" to enforce the substantive right. The policy and purpose of Congress was to equalize "as nearly as possible" the operating costs and operating conditions of "our shipowners and ship operators" with those of "their competitors". Giving the injured man "his election" would accomplish this; for he would not elect a foreign remedy unless it were better, in which case the Congressional purpose would be equally accomplished thereby.

A situation almost exactly parallel had been involved in the proviso amendment to R. S. Sec. 4530 construed in *Strathearn S. S. Co.* v. *Dillon, supra*, 252 U. S. 348, decided

37 days before the Committee on Commerce submitted its Report No. 573 proposing the Section first numbered 36 but later numbered 33 and other amendments to H. R. 10378 to apply the principles of that decision.

In the statute construed in *Strathearn S. S. Co.* v. *Dillon, supra*, 1920, 252 U. S. 348, the old section (R. S. Sec. 4530) long had been *limited* to

> "Every seaman *on a vessel of the United States.*"[1]

This clause, therefore, did not include either Americans or foreigners who were seamen *on foreign vessels.* A proviso then had been added containing two clauses[2] reading:

> "That this section shall apply to *seamen* on foreign vessels while in harbors of the United States,
>
> *and* the Courts of the United States shall be open to *such seamen for its enforcement.*"

On argument numerous briefs had pointed out that the first clause of the proviso was necessary in order to provide for the thousands of *American* seamen[3] who shipped on "foreign vessels" and who had not been covered by the prior or preceding provision limited to "Every seaman *on a vessel of the United States*". From this it was argued strongly that in absence of any express reference to "*foreign*" seamen this proviso was limited to *American* seamen on foreign vessels.[4]

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[1] Compare the *unlimited* Sec. 33 language:

> "*Any* seaman who shall suffer personal injury in the course of his employment".

[2] Compare the use of the two-clause device in Sec. 33.

[3] Compare the necessity to *American* seamen of the *second* clause of Sec. 33.

[4] Compare the opposing arguments herein that the failure to use the specific term "foreign seamen" in Sec. 33 limits it to American seamen.

It was in rejecting this argument that the Court emphasized the "*utmost importance*" (p. 354) of the "*latter* provision" of the proviso. For while the proviso clause extending the Act was necessary for *American* seamen, on foreign vessels, the "latter" or enforcement clause was *not* necessary for *American* seamen, who would have the right without it to enforce the substantive clause by suing in the United States Courts. The "latter" or enforcement clause, therefore, the Court said, would have been "superfluous" if the intention of Congress was to "*limit*" the proviso to American seamen on foreign vessels.

Comparing this "latter" or enforcement clause of the R. S. Sec. 4530 proviso with the first or enforcement clause of Jones Act. Sec. 33, their substance, function and "utmost importance" thus is identical;

R. S. Sec. 4530:	Jones Act Sec. 33:
"the courts of the United States shall be open to such seamen for its enforcement"	"*Any* seaman . . . *may, at his election, maintain an action* for damages at law with the right of trial by jury".

Of course, the word "seaman" in each of the two enforcement provisions also includes American seamen; but the significant fact, in the one statute equally as in the other, is that "no such provision was *necessary* as to American seamen . . . and, if it were the intention of Congress to *limit* the provision of the Act to American seamen, *this feature* would have been wholly superfluous".

The attempt in the brief of Norwegian Shipping Federation and Swedish Shipowners Assocation (pp. 26, 27) to distinguish the two statutes by reason of the specific mention of "seamen on foreign vessels" in the R. S. Sec. 4530 proviso overlooks the fact that this was necessitated by leaving in that statute the express *limitation* of the preceding clause to "Every seaman *on a vessel of the United States.*"

Section 33, by contrast, never contained such a limiting phrase. The inquiry in such brief (p. 26) "why specific language was not included in the Jones Act similar to that to be found in the wage statute" applies equally, therefore, to this failure to include in Jones Act Sec. 33 the specific wage-statute limiting language:

"Every seaman *on a vessel of the United States.*"

The answer is obvious. The draftsmen of Sec. 33 were starting *unhampered by either form of limited specification* but with the benefit of the recent *Strathearn S. S. Co.* v. *Dillon* decision, and used instead the comprehensive term "*Any* seaman" so as to avoid the complexity of R. S. Sec. 4530 and accomplish by that one *comprehensive* term and the grant of permission to sue what the two *limited* specifications in R. S. Sec. 4530 accomplished.

In comparing the two statutes and construing Jones Act Sec. 33 in light of the *Strathearn S. S. Co.* v. *Dillon* decision, therefore, the fact of "utmost importance" is that in Sec. 33 Congress both used a comprehensive term and included the provision which was superfluous as to American seamen but was needed by foreign seamen—viz., a grant to "*Any* seaman" of *permission* "at *his* election" to maintain an action.

Comparing FELA (45 U. S. C. Sec. 51 et seq.) the use of the permission provision in Jones Act Section 33 notwithstanding the absence of any permission provision in FELA is very significant. It was used in Section 33 to fill some need or necessity for permission to sue which was not present in FELA. This need or necessity for permission to sue could only have existed with reference to foreign seamen on foreign ships. There was no comparable group of foreign railway employees on foreign railroads to be affected by FELA. FELA is strictly a territorial statute operative only in the United States (*New York Central RR. Co.* v. *Chisholm*, 1925, 268 U. S. 29); and all employees affected were those employed by and who worked for the rail-

roads within the United States. None of them, therefore, needed to be given by FELA permission at their election to "maintain an action" at law on the substantive rights being created by FELA. Equally American seamen did not need to be given by the Jones Act permission at their election to "maintain an action" at law on the substantive rights being created by the Jones Act. The permission to maintain an action for damages at law embodied in Section 33 was for that class who in sea life needed it, namely any foreign seamen who might be injured in our territorial waters. When it is borne in mind that the very process used by Congress here was the incorporation of FELA, which did not contain such a permissive provision nor affect any class which needed permission to sue, the inclusion in Section 33 of both a comprehensive term and *permission to sue* evidences that the statute applies to foreign seamen who were the only seamen who needed a grant of permission to sue.

VI

The basic Jones Act purpose is not negatived, defeated or impaired by either the venue clause or the failure to grant a lien.

The brief of the Norwegian Shipping Federation and Swedish Shipowner's Association (pp. 21-22) argues that the venue clause in Section 33 prevents application of the statute to most foreign shipowners, and that this and the failure of Congress to provide a lien for enforcement of Sec. 33 by *in rem* proceedings indicate a purpose not to make foreign shipowners liable at all.

It should be sufficient to note that both these arguments were advanced and expressly rejected in *Uravic* v. *Jarka Co., supra,* 282 U. S. 234, at 239. But there are further reasons showing the complete fallacy of the argument.

This venue provision is "to be construed and applied in harmony with the general statute" as to venue in the

Judicial Code (*Panama Railroad Co.* v. *Johnson*, 1924, 264 U. S. 375, 384). And 28 U. S. C. A. Section 1391 unqualifiedly provides:

"(c) An alien may be sued in any district."

See Act of March 3, 1911, c. 231, Secs. 50, 51, 36 Stat. 1101, and Revised Statutes Sections 737, 739; *In re Hohorst*, 1893, 150 U. S. 653, 662 (involving suit against *Hamburg-American Packet Company*, a German steamship corporation); *Barrow Steamship Co.* v. *Kane*, 1898, 170 U. S. 100, 112 (suit against a British steamship corporation).

It, therefore, was wholly unnecessary to add any venue clause for actions against foreign owners; since by the basic venue statute they could be sued *"in any district."*

The clause actually added (by House amendment) was to *convenience American owners*, in furtherance of the expressed object and declared policy of the Jones Act to promote, develop and encourage the maintenance of the American merchant marine. It is, therefore, paradoxical to argue that a venue clause added for such a purpose can itself be taken as indicating opposite intention to give instead a competitive advantage to competing foreign shipowners by excluding them entirely from any of the costs of a tort liability such as placed on the American shipowners by the Act.

Congress, moreover, did not intend by the statute to discriminate against foreign shipowners any more than against American shipowners. The purpose was to meet competition by placing American shipowners and operators "as nearly as possible on an equality in operating costs and operating conditions with their competitors" (Senate Report No. 573, quoted at p. 47 of Petitioner's main Brief).

Foreign seamen, moreover, were not to be afforded rights *superior* to those of American seamen. To grant a *lien* to *foreign* seamen would, therefore, in this spirit, re-

quire granting a lien also to American seamen. And this, the Court said in *Plamals* v. *Pinar del Rio*, 1928, 277 U. S. 151, would not be in keeping with "An Act to provide for the promotion and maintenance of the American Merchant Marine." Compare *Remedies for Personal Injuries to Seamen, Railroadmen and Longshoremen*, 71 Harvard L. Rev. 438, 455-458, 464.

The premise for the argument, moreover, is false; a lien was not necessary for an effective remedy against foreign shipowners. As long ago as *The Hine* v. *Trevor*, 1866, 4 Wall. (71 U. S.) 555, at 571, and *The Belfast*, 1868, 7 Wall. (74 U. S.) 624, 645, this Court pointed out the availability of *attachment* in actions at law, as distinct from the *in rem* proceeding peculiar to admiralty. Attachment can be as effective against the interest of the owner as *in rem* process; the major difference being that attachment affects only the interest of the party sued as defendant, whereas the *in rem* proceeding is against the vessel itself, regardless of who may be owner. A lien, moreover, being secret, is *stricti juris* (*Plamals* v. *Pinar del Rio*, 1928, 227 U. S. 151 and cases cited). Section 33 was not intended to be strictly construed, as the grant of a lien might have caused some courts to hold.

An *in rem* proceeding, moreover, could be maintainable only in admiralty; and Congress was concerned primarily with assuring to all seamen, foreign or American, a cause of action for negligence, with permission, for its enforcement, to "maintain an action for damages *at law* with a right of trial by jury." A lien, enforceable only in admiralty, could not be enforced in an "action for damages at law with a right of trial by jury."

VII

The misinterpretation of and misplaced reliance on dicta quoted from *American Insurance Co.* v. *Canter*.

For jurisdictional purposes, under 28 U. S. C. Sections 1331 and 1333 the distinction is between "*cases*" processed at law or in admiralty, and not, as respondents contend, between two branches of Federal substantive *law*.

In contesting jurisdiction at law under 28 U. S. C. Sec. 1331, of the claims based on American general maritime law, the briefs of Quin (p. 10) and Compania (pp. 30-31), like Judge Medina in *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 2 Cir. 1955, 221 F. 2d 615, rely primarily on misunderstood dicta quoted from *American Insurance Co.* v. *Canter*, 1828, 1 Pet. (28 U. S.) 511, 545, on a question as to admiralty jurisdiction under statutory words "cases arising under the laws and Constituition of the United States", respecting which this Court in *The City of Panama*, 1879, 101 U. S. 453, 458, said:

> "Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way."*

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* *American Insurance Co.* v. *Canter*, 1828, 1 Pet. (28 U. S.) 511, was a case *in admiralty*, wherein the sole question was whether *admiralty* jurisdiction within the Florida territory acquired by treaty from Spain was lawfully granted by the territorial legislature to and lawfully exercised by a court established by the territorial legislature under powers extending to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States" (28 U. S. 543-544).

This Court held that "the act of the territorial legislature, erecting the court by whose decree the cargo of the Point à Petre was sold, is not inconsistent with the laws and Constitution of the United States, and is valid" (28 U. S. 546). The Court overruled a con-

(*Footnote continued on following page*)

The *Paduano* decision and the briefs of Quin and Compania, nevertheless, would have us believe that, under *American Insurance Co.* v. *Canter, supra,* 28 U. S. C. Sec.

(*Footnote continued from preceding page*)

tention that there was an *admiralty* jurisdiction of the Superior Court of the territory which was exclusive under a Congressional Act giving the Superior Court "the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which . . . was vested in the Courts of the Kentucky district". It stated the "question suggested" by this as follows:

> "Is the *admiralty* jurisdiction of the district courts of the United States vested in the Superior courts of Florida, under the words of the 8th Section, declaring that each of the said courts 'shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States', which was vested in the Courts of the Kentucky district? . . . Is a case of *admiralty* of this description?" (28 U. S. 545).

It was in reference to this that the Court made the statements quoted in the *Paduano* decision (*Paduano* v. *Yamashita Kisen Kabushiki Kaisha,* 2 Cir. 1955, 221 F. 2d 615, footnote 8) and in the briefs of Quin (pp. 10-11) and Compania (p. 31) herein.

In contrast this Court in *The City of Panama,* 1879, 101 U. S. 453, 458, affirmed a decree *in admiralty* for damages for personal injury to a passenger, upon libel *in rem* filed in the District Court of the Territory of Washington, saying:

> "Beyond all question *admiralty* jurisdiction, including jurisdiction in prize cases, was vested in the territorial district courts by the ninth section of the organic act, the explicit language of the act being that the district courts of the territory should have and exercise *the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States,* and also of all cases arising under the laws of the territory.
>
> Earnest effort is made in argument to show that inasmuch as a case *in admiralty* does not strictly arise under the Constitution and laws of the United States, that the clause of the organic act referred to does not vest jurisdiction to hear and determine such cases in the territorial district courts, for which proposition they refer to one of the decisions of this Court. *The American Insurance Co.* v. *Canter,* 1 Pet. 511, 546.
>
> Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the Court is explicitly and undeniably the other way" (101 U. S. 458).

1333, and the third clause of Art. III, Sec. 2 of the Constitution mean that *rights* under Federal maritime *law* can be enforced in the Federal courts only in admiralty.

But what Chief Justice Marshall was discussing in the *American Insurance Co.* v. *Canter* case, was:

> "The Constitution and laws of the United States give jurisdiction to the district courts over all *cases in admiralty;* but *jurisdiction over* the case, *does not constitute the case itself.* We are, therefore, to inquire, whether *cases in admiralty,* and *cases* arising under the laws and Constitution of the United States, are identical. . . . The Constitution certainly contemplates these as three distinct classes of *cases;* and if they are distinct, the grant of jurisdiction over one of *them,* does not confer jurisdiction over either of the other two. The discrimination made between *them,* in the Constitution, is, we think, conclusive against *their* identity" (1 Pet. 545). (Italics ours.)

Since the Constitutional provision (Art. III, Sec. 2) actually specifies *"Cases in Law and Equity,* arising under" etc.; the dicta would have been clearer had he used such term in distinguishing, as he was doing, *"cases* of admiralty and maritime *jurisdiction"* and *"Cases in Law and Equity."* Compare *The City of Panama, supra.*

For purposes of jurisdiction, the "discrimination" mentioned by the Chief Justice is not between two branches of substantive Federal *law,* or substantive *rights,* but between two procedural types of remedial *"cases."* The relevant clauses of the Constitution (Art. III, Sec. 2) and of the Judicial Code (28 U. S. C. Secs. 1331, 1333) in all instances specify *"cases."*

But any subject matter is not a *"case"* until formally submitted to a Court. In *Osborne* v. *United States Bank,* 1824, 9 Wheat. (22 U. S.) 738, 819, Chief Justice Marshall clearly distinguished a person's enforceable *"rights"* from

a "*case*" by which he asserts such rights; saying, as respects "*Cases,* in Law and Equity arising" etc., that:

> "This clause enables the judicial department to receive jurisdiction *to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case,* and the Constitution declares, that the judicial power shall extend to all *cases* arising under the Constitution, laws and treaties of the United States." (22 U. S. 819). (Italics ours.)

Illustrating the point with the case at hand, the Court said:

> "The *suit* of the *Bank of the United States* v. *Osborne and others,* is *a case,* and the question is, whether *it* arises under a law of the United States" (22 U. S. 819). (Italics ours.)

In *Cohens* v. *Virginia,* 1821, 6 Wheat. (19 U. S.) 264, 378, 404, Chief Justice Marshall said:

> "This clause extends the jurisdiction of the Court to all the *cases* described, without making in its terms any exception whatever, and without any regard to the condition of the party. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." (Italics ours.)

In *Martin* v. *Hunter's Lessee,* 1816, 1 Wheat. (14 U. S.) 304, 338, Justice Story said:

> "It is the *case,* then, and not the court, that gives the jurisdiction. If the judicial power extends to the *case,* it will be in vain to search in the letter of the Constitution for any qualifications as to the tribunal where

it depends. It is incumbent, then, upon those who assert such a qualification, to show its existence, by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistable." (Italics ours.)

Since, whatever be one's *rights*, he cannot have a *"case"* until it become so by formal suit (*Osborne* v. *United States Bank, supra*), nor be a "suitor" until he formally sues, the Constitution and statutory provisions concerning *jurisdiction* of a *"case"* and "saving to *suitors*" apply only when one as a *"suitor"* asserts his *rights* in a *form of suit* which constitutes it a *"case"*; i.e., either a *"case* of admiralty or maritime *jurisdiction"*; or, pursuant to the saving clause, a *"case"* of some one of the *"other remedies* to which they are otherwise entitled."

That it could not be otherwise is confirmed rather than refuted by Chief Justice Marshall's reasoning in *American Insurance Co.* v. *Canter, supra*, 1 Pet. (28 U. S.) 511, 545, that "the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two." For if the difference were between *rights* of persons rather than between processed *"cases"* of suitors, no statutory *right* could ever constitutionally be asserted in admiralty,* nor any maritime law *right* be constitutionally asserted at law, nor could a concurrent jurisdiction ever be constitutionally provided for.

They mean, rather that if one *sue* as by admiralty process and procedure, it must be in a Federal court of admiralty; and if one sue by process and procedure "at law" it must be in a State or Federal court of law.

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* Such a theory, for example, would render unconstitutional the Suits in Admiralty Act, which, being a statute, is unquestionably a *law* of the United States, and still, by its terms, is inforceable only in admiralty. The same would be true of the Death on the High Seas Act.

The saving clause thus does not save from exclusive admiralty jurisdiction a proceeding *in rem*, which "is a proceeding in the nature and with the incidents of a *suit in admiralty*" (*The Moses Taylor*, 1866, 4 Wall. (71 U. S.) 411, 427); for by the Constitution such "are placed, *from their commencement*, exclusively under the cognizance of the Federal courts" (*Id.* p. 430). Such a remedy "is in no sense a common-law *remedy*. It is a *remedy* partaking of all the essential features of *an admiralty proceeding in* rem" (*The Hine* v. *Trevor*, 1866, 4 Wall. (71 U. S.) 555, 571). See also *The Belfast*, 1868, 7 Wall. (74 U. S.) 624, 642, 643; *The Glide*, 1879, 167 U. S. 606, 615-619, 624.

But under the saving clause a suit *in personam* to enforce a *right* under the maritime *law* may be brought at law, either in a State court or on the law side of a Federal court having jurisdiction (*Leon* v. *Galceran*, 1870, 11 Wall. (78 U. S.) 185, 188-189; *Steamboat Company* v. *Chase*, 1872, 16 Wall. (83 U. S.) 522, 532-534; *Schoonmaker* v. *Gilmore*, 1880, 102 U. S. 118, 119; *Chappell* v. *Bradshaw*, 1888, 128 U. S. 132, 134; *Red Cross Line* v. *Atlantic Fruit Co.*, 1923, 264 U. S. 109, 123-124; *Panama R. R. Co.* v. *Vasquez*, 1925, 27 U. S. 557, 560-561) and "an action *in personam* to recover damages for tort is one of the most familiar of the common-law remedies" (*Panama R. R. Co.* v. *Vasquez*, *supra*, 271 U. S. at 561).

But in either form of suit, the *substantive law* and *rights* to be enforced are the same. As said in *Chelentis* v. *Luckenbach S. S. Co.*, 1918, 247 U. S. 372, 374:

> "The distinction between *rights* and *remedies* is fundamental. A *right* is a well founded or acknowledged claim; a *remedy* is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a *right* sanctioned by the maritime law may be enforced through an appropriate *remedy* recognized at common

> law; but . . . without regard to the court where he might ask relief, petitioner's *rights* were those recognized by the law of the sea." (Italics ours.)

The argument that exclusiveness operates differently and more completely against law jurisdiction in Federal courts than in State courts, or that the saving clause saves less to the law side of Federal courts than to State courts is contrary to all the foregoing cases. In *The Hine* v. *Trevar, supra,* 4 Wall. (71 U. S.) 555, at 569, the Court said that it is clearly established that:

> "The original jurisdiction *in admiralty* exercised by the District Courts, by virtue of the act of 1789, is exclusive, not only of other Federal courts, *but of State courts also*." (Italics ours.)

Both *Leon* v. *Galceran, supra,* 11 Wall. (78 U. S.) 185 at 188, and *Steamboat Company* v. *Chase, supra,* 16 Wall. (83 U. S.) 522, at 533, with specific reference to this point, state that "*wherever*", i.e., in whatever court, State or Federal, the common law is competent to give a party a remedy, "the right to such a remedy is reserved and secured to *suitors* by the saving clause". The fact that they also contain mention of original diversity jurisdiction without mention of the original jurisdiction now conferred by 28 U. S. C. Sec. 1331, is due solely to the fact that they were decided in 1870 and 1872 before the Act of March 3, 1875, 18 Stat. c. 137, page 470, was enacted to give original jurisdiction of cases arising under the Constitution, laws or treaties of the United States.

It was in *Martin* v. *Hunter's Lessee, supra,* 1816, 1 Wheat. (14 U. S.) 304, that the Court first suggested that it might be imperative, and at least would be wise, for Congress to provide for original jurisdiction in the lower Federal courts of cases arising under the Constitution, laws or treaties of the United States, as comprehensive

as the "judicial power" extends thereto under the Constitution (1 Wheat. 336) and said:

> "But even admitting that the language of the Constitution is not mandatory, and that Congress may Constitutionally omit to vest the judicial power in courts of the United States, *it cannot be denied, that when it is vested, it may be exercised to the utmost Constitutional extent*" (1 Wheat. 337). (Italics ours.)

The Court further said that:

> "This class of cases . . . affect, not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety" (1 Wheat. 337).

See also:

> *The Moses Taylor, supra,* 1866, 4 Wall. (71 U. S.) 411, 428-429.

In *The Mayor* v. *Cooper,* 1867, 6 Wall. (73 U. S.) 247, 252, the Court said:

> "It is the duty of Congress to act for that purpose *up to the limits of the granted power.* . . . Jurisdiction, original or appellate *alike comprehensive in either case,* may be given. *The Constitutional boundary line of both is the same.*" (Italics ours.)

It was this view that Senator Carpenter expressed when he said in proposing the Act of March 3, 1875, that:

> "This bill gives *precisely the power which the Constitution confers*—nothing more, *nothing less.*"
>
> See Hart & Wechler, *The Federal Courts and the Federal System,* page 75 quoted from in petitioner's main brief, pages 21-25.

All three opinions in *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 1955, 348 U. S. 310, 314, 323, 327, emphasize that the preponderant body of Federal maritime law is made by this Court and not by Congress.

Quin's brief (p. 14) argues that this construction will enable defendants to remove to the District Court under 28 U. S. C. Sec. 1441(b) actions initially commenced in State courts.

But, while no such question is involved here, the essential fairness of this also was pointed out by Justice Story in *Martin* v. *Hunter's Lessee, supra*:

> "The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be *plaintiffs*, and would elect the national forum, but also for the protection of *defendants* who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the *plaintiff* may always elect the state court, the *defendant* may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as given equal rights. To obviate this difficulty, we are referred to the power which, it is admitted, Congress possesses to remove suits from state courts to the national courts; . . . Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together" (1 Wheat. 348-349, 350).

See also Justice Johnson's remarks at page 378.

Unless jurisdiction exist under 28 U. S. Sec. 1331, right of removal cannot exist under Sec. 1441(b), and *plaintiff parties only* would have a choice between Federal and

State court original jurisdiction; and this, notwithstanding that both sections use language comprehending "nothing less" than the Constitution uses in defining the judicial power, including this Court's power of review.

No right of removal, however, would exist unless the matter in controversy exceeded $3,000 (28 U. S. C. Secs. 1331 and 1441(b)), and where the Jones Act is relied on, no right of removal would exist, since jurisdiction is expressly made covenant by the incorporated provisions of FELA (45 U. S. C. Sec. 56). The removability argument thus is both insubstantial and irrelevant.

Conclusion

In conclusion we say the Seamen's Act of March 4, 1915, was as to lifeboat equipment and Section 33 of the Jones Act a safety measure (see LaFollette, Vol. 1, p. 523, MacMillan, 1953). We urge this Court to adhere to the uniformity doctrine of the Maritime Law and enforce it against all persons and vessels within the jurisdiction of the Court, permitting any seaman to choose the American forum for the enforcement of his rights, so that foreign and American vessels, in the absence of treaty and legal restrictions to the contrary, shall operate under equal conditions.*

Respectfully submitted,

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* While foreign seamen are free from arrest for desertion (see ratification 1929 Safety Treaty, Merchants Seamen's Law, Axtell, p. 145), they are subject to deportation on order of the Commissioner of Immigration.